

CLIENT ALERT

The Commission inserts itself into public procurement procedures to control foreign subsidies

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AUTHORS

Faustine Viala | David Kupka | Sophie Mitouard

Since October 12th bidders participating in public procurement procedures have to integrate, in the preparation of their submissions, new requirements introduced by the new European regulation on foreign subsidies (the “**FSR**”).

In a nutshell, pursuant to the FSR:

- when in a public procurement procedure the contemplated contract value is at least EUR 250 million, companies participating in the procedure have to provide information about the foreign financial contributions they may have received from non-EU states;
- “financial contribution” encompasses a wide scope of financial support that is directly or indirectly linked to a foreign state (including injection of capital, loans, tax exemptions, debt forgiveness, and the provision or purchase of goods and services);
- any bidder must submit, through the contracting authority, information to the Commission about the foreign financial contributions awarded in the last three years to its subsidiaries, holdings and main subcontractors and suppliers;
- when the aggregated value for foreign subsidies from an individual foreign country exceeds EUR 4 million, companies have to submit a notification detailing each of the financial contributions above EUR 1 million likely to

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distort the internal market, as defined by the FSR, and provide information enabling the Commission to assess whether the contract can be awarded to the concerned company or not;

- when the EUR 4 million threshold is not met, the tenderers still have to submit a declaration with information on foreign financial contributions granted to economic operators over the past three years (in a less detailed manner).

In order to understand the extent of this new regulation and the impact it may have, it is important to recall its purpose and the nature and scope of the obligations it imposes on companies. The discussion below focuses on the requirements imposed on companies participating in public procurement procedures but the FSR also requires a filing for some concentrations¹ and gives the European Commission (the “**Commission**”) *ex officio* powers to investigate whether foreign subsidies have provided benefits to economic operators in public procurement procedures and M&A transactions that fall outside the scope of the filing obligations.

FSR: what is it about? As a reminder, the FSR was adopted on 14 December 2022 with the aim of filling a legislative gap relating to subsidies that would not be caught by the European legislation, where they could distort competition in the internal market. State aid rules indeed only catch contributions from Members States and there was no tool to control undertakings that would operate in the internal market with the benefit of aid from foreign states.

This new regulation has been designed in order for the Commission to be informed of all foreign financial contributions granted to economic operators involved in transactions or public procurement procedures meeting the thresholds defined in the FSR. The Commission then determines, in the context of the operation having triggered a filing, whether such financial contribution constitutes a foreign subsidy, namely whether it confers a benefit to the concerned economic operator, and whether it can distort competition. In the context of public procurement procedures, the applicable test consists in detecting tenders that are unduly advantageous due to foreign subsidies. However, the scope of requested information—as it will be further described below—has raised questions about their relevance and adequacy for the Commission to carry out its analysis and eventually protect the level playing field in the European market, especially in the context where the thresholds are not met.

What are the bidders’ obligations when participating in public procurement procedures? The obligations described hereafter concern public procurement procedures for the conclusion of a public contract, including in specific sectors² or

¹ In the context of concentrations, companies will have to file for an authorization from the Commission when one of the merging parties, the joint venture or the target has EUR 500 million revenue in the European Union and when the concerned parties (the acquirer(s), the merging parties or the mother companies and their joint venture) were granted at least EUR 50 million in the last three years. See Willkie Alert from [February 14, 2023](#).

² See Directive 2014/25/EU.

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concession contracts. There is an exemption for a contracting authority or entity using the negotiated procedure without a prior call for competition for reasons of extreme urgency.³

As of 12 October 2023 a notification obligation arises when:

- (i) the estimated value of the public agreement or framework agreement is at least **EUR 250 million** and, when bidding on one or several lots, the aggregated value of those lots is at least **EUR 125 million**; and
- (ii) the economic operator received at least **EUR 4 million** from a third country in the last three years. It should be emphasized that this threshold will have to be assessed based on the aggregate value of all financial contributions awarded, per third country, to the economic operator participating in the procurement procedure but also *“its subsidiary companies without commercial autonomy, its holding companies and, where applicable its main subcontractors and suppliers involved in the same tender”*. According to the regulation, subcontractors and suppliers are deemed *“main”* when their participation ensures key elements of the contract performance or exceeds 20% of the value of the submitted tender.⁴ FSR therefore introduces a new and hybrid concept, extending the definition of “economic operator” in public procurement law in a manner that integrates the different forms tenderer can take⁵ and that is closer to the definition of an “undertaking” under competition law, which includes the whole group.

On this basis, economic operators will have to either notify the contracting authority or entity of the existence of their foreign financial contributions or declare that they do not meet the EUR 4 million threshold described above.

What information needs to be provided in the filing? Economic operators will submit their notification or declaration in compliance with the form provided by the implementing regulation 2023/1441 of 10 July 2023, the form “FS-PP”. Incompleteness or false statements may be fined up to 1% of the total revenue of economic operator. The main contractor will be in charge of submitting the notification or the declaration, however each notifying party is responsible for the veracity of the information it shares with the Commission.

As mentioned above, when the thresholds are met, the economic operators will have to submit a notification that, aside from the information on the public procurement procedure and the notifying parties, will have to include information on the foreign financial contributions received by the notifying parties. The FSR distinguishes, however, between information on (i)

³ FSR, Article 28 (4).

⁴ FSR, Article 29 (5).

⁵ In public procurement law, an “economic operator” will include “any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market” (see, e.g., Article 2(1), point (10) of Directive 2014/24/EU).

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financial contributions listed in Article 5 of the FSR, regarded as “*most likely to distort the internal market*”,⁶ and (ii) other financial contributions.

- Regarding foreign subsidies likely to distort the internal market, the form includes a questionnaire designed to assess whether financial contributions belong to this category. In addition, the notifying party will have to provide for each of the foreign financial contributions equal to or in excess of EUR 1 million, details on:
 - the form of the contribution, its amount and its origin as well as the economic rationale and the conditions under which it was granted;
 - whether it confers a benefit to certain undertakings or industries;
 - the absence of unduly advantageous tender, which can be justified based on similar arguments to the ones that would be used for abnormally low tenders; and
 - the positive effects of the subsidy on the concerned economic activity or others.
- Regarding other contributions, when individually above EUR 1 million and, on an aggregate basis, above at least EUR 4 million per country,⁷ the information needs to be provided in the form of a table gathering information per country and per type of contribution. The parties must also include the purpose of each type of foreign subsidies.

Importantly, when the EUR 4 million threshold is not met, the economic operators will still have to file a declaration with the general information on the procedure and the parties, a statement that none of the notifying parties have received notifiable foreign financial contributions and information on foreign financial contributions that are not notifiable.⁸

The notifying parties can request waivers to submit certain information, provided that they are in a position to provide an adequate justification as to why the information is not available or necessary. However, the flexibility that the Commission will offer the companies on this basis remains to be seen, especially since the Commission will also have the power to request additional information.

⁶ FSR, Article 5 includes foreign subsidies granted to an ailing undertaking likely to go out of business; an unlimited guarantee for the debts or liabilities of a undertaking; an export financing measure in contradiction with the OECD arrangement; a foreign subsidy enabling an undertaking to submit an unduly advantageous tender.

⁷ In other words, if a country awarded EUR 1 million and EUR 2 million of foreign subsidies to an economic operator, the latter does not need to report them, provided that those contributions do not fall within the category of Article 5 of the FSR.

⁸ Namely all financial contributions over the last three years, (i) above EUR 1 million (but below EUR 4 million on an aggregate basis) as well as all (ii) financial contributions below EUR 1 million but above EUR 200,000, per country.

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Timing and outcomes of the procedure? First, it should be noted that the contract cannot be awarded as long as the Commission's notification review is running. Any delay will therefore have an impact on the procurement procedure.

In practice, economic operators will communicate the information detailed above to the contracting authority or entity, which will then pass it on to the Commission. Such information is submitted with the tender in open procedures, or with the request to participate and then with the tender in a multi-stage procedure. If a notification or a declaration is missing, and not provided after ten business days of the public authority's request, the latter can reject the submission of the economic operator as irregular. Similarly, if an economic operator does not comply with a request from the Commission to complete its notification or declaration, the Commission is entitled by the FSR to adopt a decision declaring the tender irregular, the public authority would then also formally reject it. In addition, the absence of filing when required by law can be fined as can the provision of incorrect information.⁹

The Commission will conduct a preliminary review of 20 business days (with a possible extension of 10 business days) after receipt of a complete notification or declaration. The Commission can then either decide to open an in-depth investigation or close its preliminary review.¹⁰ The in-depth investigation should be conducted in 110 business days (or 130, in exceptional cases). In cases of multi-stage procedures, requiring two filings, the Commission has 20 business days after each filing and 90 days in the case of an in-depth investigation.¹¹ If the Commission has not adopted a decision at the end of the in-depth investigation period, the contract can be awarded to any economic operator.

The Commission will assess during the in-depth investigation whether economic operators benefited from foreign subsidies distorting competition. Its assessment will be based on a "balancing test" weighing the identified negative and positive effects that the economic operators would have been able to put forward. As a result, the Commission may adopt:

- a no objection decision;
- a decision with commitments, to make the commitments economic operators would have offered binding; or
- a decision prohibiting the award of the contract, when the Commission would have found that the commitments offered by the companies are not sufficient or inappropriate, or in the absence of any proposal to remedy the distortion it would have identified.

⁹ The absence of notification or the attempt to circumvent the obligation of notification can be fined up to 10% of the aggregate turnover of the economic operators. The provision of incorrect or misleading information can be fined up to 1% (see Article 33 of the FSR).

¹⁰ The closing of a preliminary review is not subject to a decision, therefore the Commission can reopen it based on new information.

¹¹ For more details see Article 29 of the FSR.

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Key takeaways and practical considerations

- Identify the likelihood of being involved in public procurement procedures above EUR 250 million.
- Identify for economic operators likely to be involved in such procedures the financial contributions granted from non-EU countries over the past three years (including subsidiaries and holdings) and whether the EUR 4 million is met.
- Keep in mind that this information will have to be disclosed when participating in public procurement procedures above these thresholds at the same time as the tender or the request to participate.
- Set up a reporting system enabling the tracking of new foreign financial contributions above EUR 1 million and EUR 200,000 on an aggregate basis, per country.
- Be mindful that non-compliance with the FSR can lead to rejection of a tender and potential fines.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Faustine Viala

33 1 53 43 45 97

fviala@willkie.com

David Kupka

32 2 290 18 20

dkupka@willkie.com

Sophie Mitouard

33 1 53 43 45 82

smitouard@willkie.com

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